Supreme Court, U.S.
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FEB 28 1992
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No. 91-1230

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HOUSTON LIGHTING AND POWER COMPANY,
Petitioner,

v.

THE HONORABLE JOSEPH B. MORRIS, JUDGE
(CITY OF SAN ANTONIO AND CENTRAL POWER
AND LIGHT COMPANY, REAL PARTIES IN INTEREST)
Respondents.

CITY OF SAN ANTONIO'S BRIEF IN OPPOSITION TO HOUSTON LIGHTING AND POWER COMPANY'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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February 28, 1992

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QUESTIONS PRESENTED FOR REVIEW

1. Does the United States Supreme Court have jurisdiction of a petition for writ of certiorari to challenge certain orders entered by a Texas state court which are not final and not appealable, and which were entered more than nine months prior to the filing of the petition?

2. Is there any denial of due process where a Texas state court compels arbitration of a dispute in precise accordance with the arbitration agreement of the parties, and with a majority of the panel controlled by neutral arbitrators?

LIST OF PARTIES

Houston Lighting & Power Company

Petitioner,

City of San Antonio, Texas, acting by and through City Public Service Board of San Antonio
Central Power and Light Company
City of Austin, Texas
Honorable Joseph B. Morris, Judge of the 101st Judicial District Court of Dallas County, Texas

Respondents.

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(City of San Antonio and Central Power
And Light Company, Real Parties in Interest)
Respondents.

CITY OF SAN ANTONIO'S BRIEF IN OPPOSITION TO HOUSTON LIGHTING AND POWER COMPANY'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

On January 27, 1992, Petitioner Houston Lighting & Power Company ("HL&P") filed a Petition for Writ of Certiorari challenging orders entered by a state district court in Texas on August 22, 1990, and April 22, 1991. The first order granted Respondent's Motion to Stay Litigation and Compel Arbitration; the second order denied Petitioner's Motion and Supplemental Motion for Appropriate Relief in Aid of Fair Arbitration, which rehashed the same arguments made by Petitioner in opposing Respondent's original motion. Because the orders were entered more than ninety (90) days prior to HL&P's Petition, the Petition

is untimely; because the orders are not final, they are not subject to review; and because Petitioner's due process claim is groundless, the Petition for Writ of Certiorari must be denied.

STATEMENT OF THE CASE

While Petitioner's Statement of the Case is replete with factual misstatements and omissions, Respondent will address only those which are germane to this proceeding. Petitioner's key misstatement, illustrative of the false premise of its entire Petition, is that the state district court has required Petitioner to submit to arbitration of claims against it by a majority vote of a panel, "when the panel majority has been appointed by the plaintiffs [Petitioner's Questions Presented for Review, No. 1]." The truth is that in accordance with the order of the Texas state court complained of (Petitioner's App. 1a), the claims against Petitioner will be decided by a panel of five arbitrators, of which the only one *not* neutral will be the one appointed by Petitioner itself. The state court's order provided (Petitioner's App. 2a) that "this case should be stayed pending arbitration by arbitrators appointed pursuant to Section 23.2 of the Participation Agreement" which specifies (Petitioner's App. 21a) that each of the four project participants may appoint one arbitrator, and if necessary to make the total number of arbitrators an odd number, the arbitrators so appointed shall elect one additional arbitrator. To date, all four participants have appointed arbitrators, who have deferred appointing the fifth arbitrator pending the resolution of Petitioner's myriad efforts to delay the arbitration.

Contrary to the predicate of Petitioner's entire argument, there is no panel majority biased against

Petitioner. First of all, Petitioner concedes that, *other than* the arbitrator appointed by Petitioner, each of the other three appointed arbitrators has taken a sworn oath to perform as a neutral arbitrator and to "faithfully, fairly and impartially hear and examine the matters in controversy between the above-named parties, in accordance with their Arbitration Agreement and the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes" (Petitioner's App. 27a). Nonetheless, Petitioner makes the groundless and insulting assertion that despite that oath, appointees who know they were chosen by a party to a dispute cannot be considered neutrals.

Even ignoring for the moment Petitioner's paranoid and unsubstantiated misperception, and ignoring as well Petitioner's sufficient legal remedy to avoid any adverse arbitration award shown to be the product of evident partiality, there is still no basis for Petitioner's analysis: there are only two parties making arbitration claims against the Petitioner, San Antonio and CPL. The remaining project participant, City of Austin, has no arbitration claims pending, though it was permitted by the court to appoint an arbitrator, in accordance with the parties' Arbitration Clause. Significantly, Petitioner *urged* the trial court to allow City of Austin to appoint an arbitrator to assure the fairness of the panel and compliance with the Arbitration Clause. Petitioner argued "[i]f one panel is to determine all disputes, then HL&P, Austin, CPL and San Antonio are entitled to appoint arbitrators, and at least one clearly impartial arbitrator must then be selected" (Respondent's App. 5a). Petitioner successfully insisted in the state court that all participants were entitled to arbitrators and that

a panel composed of four party-appointed arbitrators and a fifth neutral is what the parties intended in their agreement (Respondent's App. 5a). Petitioner investigated the qualifications of City of Austin's sworn-to-be-neutral arbitrator, Mr. John Lawrence, and reported to the trial judge "Austin's designated arbitrator is a disinterested and impartial arbitrator" (Respondent's App. 5a). In accordance with Petitioner's urging, the state court permitted City of Austin's appointment of an arbitrator (Petitioner's App. 2a).

Now, as Petitioner has virtually exhausted its quiver of procedural arrows to delay an arbitration requested by Respondent in March 1988, its analysis has conveniently taken a 180-degree turn. Thus, Petitioner now suggests (Petition p. 6) that the state court's permitting City of Austin to appoint an arbitrator "exacerbated the problem," relying upon the pendency of a different claim in a different forum by City of Austin against Petitioner to support the proposition that City of Austin's sworn neutral arbitrator is actually aligned against Petitioner. This contention is not credible, since that City of Austin claim against Petitioner was *already* in litigation, both at the time City of Austin appointed Mr. John Lawrence its arbitrator, and at the time Petitioner urged the state court that he was "disinterested and impartial" and that his appointment should be allowed (Respondent's App. 5a). HL&P's attempt to rewrite history to concoct its "stacked deck" arbitration panel argument must not be countenanced, and the entire hypothesis of its Petition that the "panel majority has been appointed by the plaintiffs" is simply untrue—sufficient

reason without more for this Court to deny its Petition for Writ of Certiorari.

Petitioner is likewise guilty of other misstatements, which are of less import to the Court's decision, but which Respondent cannot leave unchallenged. Attempting to fabricate a bias argument, Petitioner presented an affidavit to the state court based on total speculation as to the nature and amount of Respondent's claims, and speculation as to the utilization Respondent would make of any funds received through an arbitration award, and the potential financial stake of arbitrators. Petitioner's hypotheses were opposed by affidavit (Respondent's App. 1a), were carefully considered by the state court, and were properly rejected. Petitioner failed to substantiate, either factually or by competent legal authority, its argument that an arbitrator (or judge for that matter) is automatically disqualified from participating in a case simply by reason of his being a ratepayer of an involved utility. Such a premise would typically disqualify all judges in any jurisdiction from presiding in any case involving any utility therein, and is simply not the law. *In re New Mexico Natural Gas Antitrust Litigation,* 620 F.2d 794, 795-7 (10th Cir. 1980); *In re Virginia Electric & Power Co.,* 539 F.2d 357, 366-9 (4th Cir. 1976).

Petitioner criticizes the Texas district judge for not taking what it calls "corrective steps" (Petition p. 8), suggesting various and sundry methods of composing alternative arbitration panels. The simple answer to that criticism is that the district judge ordered "arbitration by arbitrators appointed pursuant to Section 23.2" of the parties' agreement, thus binding Petitioner to the arbitration agreement it bargained

for, rather than substituting some other terms newly proposed by Petitioner.

Finally, in a factual statement which is of limited relevance herein, but which is grossly inaccurate, Petitioner states (Petition p. 4), with respect to a lawsuit by City of Austin against Petitioner: "A jury found that the cost of STP had not been increased by any failure of HL&P to perform its duties as Project Manager." This is a rank misrepresentation by Petitioner. In fact, the trial court in that case refused City of Austin's request to even submit to the jury the quality of Petitioner's performance of its duties as Project Manager. It is that very refusal which is the focal point of City of Austin's pending appeal in the Texas Court of Appeals at Dallas.

SUMMARY OF ARGUMENT

The United States Supreme Court lacks jurisdiction of the Petition for Writ of Certiorari because it was filed out of time, being filed more than nine months after entry of one of the orders that it challenges, and more than 17 months after entry of the other. Moreover, the Texas state court orders attacked by Petitioner are not final and appealable orders, nor was the procedural step of mandamus available to Petitioner. Accordingly, neither order is a final judgment or decree which is ripe for consideration by this Court. Finally, the Texas state court enforced the applicable arbitration clause in the agreement between the South Texas Project participants precisely in accordance with its terms. Under the law and the public policy of the United States, the state court was not only correct but was required to do so, and ac-

cordingly the issue of a denial of due process is not even raised herein.

ARGUMENT

I. This Court Lacks Jurisdiction of the Petition

A. HL&P'S Petition is Untimely

28 U.S.C. § 1257(a)[1] provides for certiorari review under stipulated circumstances of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 2101(c) provides that a petition for certiorari must be filed within ninety (90) days of the date of the judgment complained of. The introductory paragraph of HL&P's Petition and its jurisdictional argument recognize that the orders in issue were entered by the District Court of Dallas County on August 22, 1990, and April 22, 1991. HL&P maintains that its efforts at seeking a writ of mandamus tolled the deadline for filing of its Petition. The orders in issue were not subject to mandamus review by higher Texas courts, however, and HL&P's Petition is therefore untimely.

Nash v. Florida Indus. Comm'n, 389 U.S. 235, 237 n.1 (1967) teaches that identifying the highest state court competent to consider a matter requires a review of state law. Accordingly, this Court must examine Texas law to determine whether mandamus review is available to attack orders compelling arbitration.

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[1] HL&P incorrectly seeks to rely on "28 U.S.C. § 1257(3)," a provision that was redesignated as § 1257(a) when Congress eliminated appellate review of state court decisions some four years ago.

Texas courts consistently hold that mandamus is not available to subvert an order compelling arbitration. An example of such authority is *McMullen v. Yates*, 697 S.W.2d 500, 502 (Tex. App.—San Antonio 1985, no writ), in which the court of appeals held that the relator was not entitled to a writ of mandamus requiring the trial court to vacate an order compelling arbitration. In deciding that the relator had an adequate remedy on appeal following entry of judgment, the court observed that an order compelling arbitration is comparable to an order granting a plea in abatement, a decision not subject to review in a mandamus proceeding. The court reasoned that:

> If we assume, while not deciding, that the court incorrectly compelled arbitration, the resulting delay is no more onerous than being forced to try a case in an inappropriate venue, or suffering an incorrect ruling on a plea to the jurisdiction, a plea in abatement, or any other interlocutory order that is *not subject to correction by mandamus*.

Id. (emphasis added) (footnote omitted).

The San Antonio Court of Appeals affirmed and explained the McMullen decision in *Shearson Lehman Hutton, Inc. v. McKay*, 763 S.W. 934, 938-39 (Tex. App.—San Antonio 1989, no writ), holding that while appellate courts have mandamus jurisdiction to correct a decision denying a motion to compel arbitration, there is no jurisdiction to review a decision compelling arbitration. *Id.* at 939. The court explained that the difference in the availability of mandamus review was dictated by the public policies favoring arbitration: "Once forced to trial, the benefits of ar-

bitration are forever lost: the speed and economy of first going to arbitration are defeated. This benefit cannot be regained on remand." *Id.* The court reasoned that mandamus was not appropriate when the interlocutory decision is one compelling arbitration "because relator has an appeal available once a final judgment is entered and he loses no contract rights or benefits by availing himself of arbitration." *Id.*

As described in the Statement of the Case section of this Response, HL&P's Motion for Appropriate Relief argued the same issues previously addressed to the district court in HL&P's responses to the Motion of San Antonio and CPL to Compel Arbitration, and the effect of the order overruling HL&P's Motion was identical to that of the order granting the Motion of San Antonio and CPL. As such, the latter order was no more subject to mandamus review than the former, and HL&P's Petition is out of time as to both.

HL&P sought to avoid the problem it recognized as to the timeliness of its Petition by contending that its efforts to seek mandamus relief tolled the deadline for filing. The argument presupposes, however, the availability of mandamus review which, as demonstrated above, was patently nonexistent. Surely, efforts to seek relief in tribunals where that relief is legally unavailable does not excuse late filings with this Court. The highest court that could render the orders complained of was the district court which entered them, and HL&P's Petition is therefore tardy by many months.

B. HL&P'S Petition Seeks Review of an Order That is Not a Final Judgment

Of course, this Court may only entertain final judgments or decrees on certiorari. As Professor Wright

states, "[t]he most elementary component of the final judgment rule is that there must be a judgment." 16 Charles A. Wright *et al., Federal Practice and Procedure* § 4009 (1977). Both the Federal Arbitration Act, 9 U.S.C. § 9 and the Texas General Arbitration Act, art. 238-1 (Respondent's App. 7a), contemplate that following the arbitration panel's decision, a judgment will be entered. Accordingly, there is presently no final judgment for this Court to review.

The Fifth Circuit Court of Appeals relied on identical reasoning in holding that an order staying proceedings pending arbitration is not final for purposes of review under 28 U.S.C. § 1291.[2] *Jolley v. Paine Webber Jackson & Curtis, Inc.*, 864 F.2d 402 (5th Cir. 1989). The court began by quoting the classic Supreme Court holding that a decision is only final when it "ends the litigation on the merits and leaves nothing for the court to do but execute judgment." 864 F.2d at 405, *quoting Catlin v. United States*, 324 U.S. 229, 233 (1945). The *Jolley* court next cited *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133 (1988) for the proposition that neither orders granting nor orders denying a stay pending arbitration are final, because neither ends the litigation on the merits. "While an order granting a stay postpones actual litigation in the district court, it contemplates that the district court will retain jurisdiction to confirm, modify, or, in some cases, to renew the litigation

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[2] The requirements for finality of § 1291 and § 1297 are essentially coextensive as evidenced by the Supreme Court's treatment of authority from actions involving one statute as controlling in cases involving the other. *E.g., American Export Lines v. Alvez*, 446 U.S. 274 (1980), *overruled on other grounds by Miles v. Apex Marine Corp.*, 111 S. Ct. 317 (1990).

despite the arbitration award." 864 F.2d at 405. Because of the requirement for additional court action, the *Jolley* court held that an order compelling arbitration is not final.

Gulfstream and *Jolley* have been modified somewhat by the enactment of 9 U.S.C. § 16, part of the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, but only as the cases relate to the review of orders denying arbitration. The statute permits review of such orders but, consistent with previous case law, prohibits appellate consideration of orders which stay court proceedings pending arbitration or compelling arbitration. The statute is significant, first because it recognizes that orders compelling arbitration are interlocutory (and thus not dispositive of litigation) and second because it indicates a Congressional policy against review of orders compelling arbitration, *Turboff v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 867 F.2d 1518, 1520 (5th Cir. 1989), a policy that would be violated were this Court to entertain HL&P's Petition.

Section 16 of the Federal Arbitration Act may apply to Texas appellate courts. In *A. G. Edwards & Sons, Inc. v. Clark*, 558 So.2d 358, 360-61 (Ala. 1990), the Alabama Supreme Court held that the statute (then designated § 15) delimited its power to consider an order concerning arbitration. This position is consistent with the holding of *Southland Corp. v. Keating*, 465 U.S. 1, 11-13 (1984), that the Federal Arbitration Act creates a body of federal substantive law regarding the enforcement of arbitration agreements involving interstate commerce, regardless of the forum in which enforcement is sought. The Fed-

eral Arbitration Act therefore provides an independent basis for the conclusion that the orders complained of are not final.

Wholly apart from federal case law and the Federal Arbitration Act, Texas doctrine prohibits appellate review of orders compelling arbitration because such orders are neither final nor subject to interlocutory review. For example, in *Citizens Nat'l Bank v. Callaway,* 597 S.W.2d 465, 466 (Tex. Civ. App.—Beaumont 1980, writ ref'd), the court squarely held that an order compelling arbitration is not a final judgment subject to appellate review. The court began by noting that in order for a judgment to be final, it "must dispose of all the issues and parties in a case." *Id., citing North East Indep. School Dist. v. Aldridge,* 400 S.W.2d 893, 895 (Tex. 1966). Observing that an order compelling arbitration of a dispute does not finally dispose of the matter, the court dismissed the appeal for lack of jurisdiction.

Similarly, in *Bethke v. Polyco, Inc.,* 730 S.W.2d 431 (Tex. App.—Dallas 1987, no writ), the court of appeals recognized that the trial court's order compelling arbitration represented simply "the first step in the ultimate disposition of the dispute between the parties." *Id.* Because the order was therefore not final, the court of appeals refused to exercise jurisdiction.

It is so clear that orders compelling arbitration are not appealable in Texas that the issue is generally conceded. For instance, in *McMullen v. Yates, supra,* the parties acknowledged that the trial court's order was not a final judgment. 697 S.W.2d at 501.

Article 238-2 of the Texas General Arbitration Act (Respondent's App. 7a) also recognizes that appellate

review of orders compelling arbitration is not available. Like its federal counterpart, the statute permits appeals of orders refusing to compel arbitration. On the other hand, Article 238-2 does not authorize appeals of orders compelling arbitration. It is logical to conclude then that the Texas Legislature agrees with all of the courts of Texas that orders compelling arbitration are not final judgments.

In conclusion, the Federal Arbitration Act, the Texas General Arbitration Act and the Texas and Federal case law all recognize that the orders attacked by HL&P are not final judgments or decrees. Obviously, this Court therefore has no jurisdiction to address the issues raised by HL&P's Petition at this time.

II. Where a State Court Enforces an Arbitration Agreement Precisely in Accordance with its Terms, There is no Denial of Due Process

The court's order compelling arbitration specified that the arbitrators should be selected in accordance with the terms of the Participation Agreement. The order accorded with the mandates of Article 226 of the Texas General Arbitration Act and § 5 of the Federal Arbitration Act to the effect that agreed-upon methods of arbitrator selection "shall be followed," and did not deny due process to HL&P.

Initially, it is clear that the court's enforcement of the negotiated procedure will produce a fair and balanced panel, as once recognized by HL&P. At the same time, the panel would not be rendered defective even if a majority of the arbitrators were to be selected by parties adverse to HL&P. HL&P's argument to the contrary is based on cases involving

tripartite arbitration and wholly disregards the possibility that a party-appointed arbitrator can operate as a neutral. Indeed, one of the authorities relied upon by HL&P recognizes that a party-appointed arbitrator may act as a neutral. *Code of Ethics for Arbitrators in Commercial Disputes,* Canon VII (Respondent's App. 8a).

Given that HL&P cannot sustain the argument that party-appointed arbitrators are necessarily partisan, it resorts to the position that the "appearance of bias" requires reconfiguration of the panel, basing its argument on what it terms the holding of *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145 (1968) (Black, J., plurality opinion). It is true that in that case, Justice Black, writing for a plurality of four justices, appeared to impose on arbitrators the same lofty ethical standards applicable to Article III judges. At the same time, four justices do not constitute a majority of the Supreme Court. Several cases in which the court has been cited to the language in Black's opinion have held that arbitrators are not subject to disqualification due to an appearance of bias, and the Supreme Court has declined at least two opportunities to correct the opinions. *See, e.g., Pitta v. Hotel Ass'n of New York City, Inc.,* 806 F.2d 419, 423 (2d Cir. 1986); *Florasynth, Inc. v. Pickholz,* 750 F.2d 171, 173-74 (2d Cir. 1984); *Morelite Constr. Corp. v. New York City Dist. Council Carpenters,* 748 F.2d 79, 83 (2d Cir. 1984); *Merit Ins. Co. v. Leatherby Ins. Co.,* 714 F.2d 673, 679 (7th Cir.), *cert. denied,* 464 U.S. 1009 (1983); *International Produce, Inc. v. A/S Rosshavet,* 638 F.2d 548, 551-52 (2d Cir.), *cert. denied,* 451 U.S. 1017 (1981). These cases all hold that an individual is not disqualified from

serving as an arbitrator unless he demonstrates "evident partiality," a standard described in § 9 of the Federal Arbitration Act. As described in *Morelite*, "evident partiality" is a considerably lower standard than that by which Article III judges are evaluated, and an arbitrator is only disqualified "where a reasonable person would *have to* conclude that an arbitrator was partial to one party to the arbitration." 748 F.2d at 84 (emphasis added).

HL&P's consent to the arrangement it now attacks is a matter of dispositive significance. As this Court recognized in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-9 (1986), the right to Article III's guarantee of an independent and impartial adjudication is "subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." Notably, assent to private arbitration operates as just such a waiver. *Geldermann, Inc. v. Commodity Futures Trading Comm'n*, 836 F.2d 310, 316-318 (7th Cir. 1987), *cert. denied*, 488 U.S. 816 (1988). *FDIC v. Air Florida Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988), and *Elmore v. Chicago & I.M. Ry.*, 782 F.2d 94, 96 (7th Cir. 1986), are consistent with *Geldermann*, recognizing that private arbitration does not implicate due process considerations.

The foregoing authorities indicate the importance of judicial deference to the agreement of the parties. As established by other cases, parties to an arbitration agreement will not be heard to attack the terms of their own agreement. "Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication." *Moseley*,

Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 268 (7th Cir. 1988), *citing Stroh Container Co. v. Delphi Indus., Inc.,* 783 F.2d 743, 751 n.12 (8th Cir.), *cert. denied,* 476 U.S. 1141 (1986). Likewise, "[t]he parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen." *Merit Ins. Co.,* 714 F.2d at 679.

The foregoing cases describe important principles which preclude this Court from intervening to rewrite the parties' agreement. Private arbitration does not include due process protections, and the panel's composition is in any event a fair one. Under the circumstances, there is no basis for this tribunal to assume the task of configuring a panel which will be more agreeable to HL&P than the one the parties mutually agreed upon years ago.

CONCLUSION

The United States Supreme Court does not have jurisdiction of a Petition for Writ of Certiorari to challenge state court orders which are not final and not appealable, and which were entered more than nine months prior to the filing of the Petition. Furthermore, there is no denial of due process where a state court compels arbitration of a dispute in precise accordance with the arbitration agreement of the parties, and with a majority of the panel controlled by neutral arbitrators. Consequently, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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